

**UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER**

UNITED STATES OF AMERICA,)	
Complainant,)	8 U.S.C. § 1324a Proceeding
)	
v.)	OCAHO Case No. 99A00004
)	
ANDY FLORES)	Judge Robert L. Barton, Jr.
DBA BABIES SPORTSWEAR,)	
Respondent.)	
)	

**ORDER DENYING COMPLAINANT’S MOTION TO STRIKE RESPONDENT’S
ANSWER, FINDING ABANDONMENT BY RESPONDENT, AND ENTERING
DEFAULT JUDGMENT FOR COMPLAINANT**

(April 16, 1999)

I. INTRODUCTORY PARAGRAPH

Complainant filed a Motion to Strike Answer and Motion for Default Judgment on March 1, 1999. The Motions center around Complainant’s allegations that Respondent’s Answer, submitted by Respondent’s counsel who has since appropriately withdrawn from representing the Respondent, should be stricken as nonresponsive, and therefore a default judgment should be entered. The main issues of this order are:

- (1) whether Respondent’s Answer should be stricken, and a default judgment entered;
and
- (2) whether default judgment should be entered for Complainant, even if the Answer is not stricken, because Respondent has abandoned its request for hearing.

For the reasons discussed below, I deny Complainant’s Motion to Strike Answer, but grant its Motion for Default Judgment pursuant to 28 C.F.R. § 68.37(b) and (b)(1) (1998).¹ Thus, I find

¹ Certain portions of Part 68 of Title 28 of the Code of Federal Regulations have been amended. References to those portions not affected by the interim rules are to the 1998 volume of the Code of Federal Regulations. References to the amended portions of Part 68 are to the interim rules published in the Federal Register at Vol. 64, no. 29, page 7066.

that Respondent shall pay the proposed civil money penalty amount of \$140,010. Respondent is also ordered to cease and desist from hiring or continuing to employ aliens in the United States knowing the aliens are, or have become, unauthorized aliens with respect to such employment.

II. BACKGROUND AND PROCEDURAL HISTORY

On August 4, 1994, Complainant served a Notice of Intent to Fine on Respondent. Respondent filed a timely request for hearing by letter dated September 6, 1994, and Complainant filed a seven-count Complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) on October 27, 1998.

Count I of the Complaint contains allegations that Respondent hired and/or continued to employ seven named individuals after November 6, 1986, for employment in the United States, knowing that those individuals were not authorized to work in the United States in violation of sections 274A(a)(1)(A) and 274A(a)(2) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1324a(a)(1)(A) and 8 U.S.C. § 1324a(a)(2). See Compl. at 2-3. Complainant seeks a \$1,500 penalty for each of these seven violations, for a total Count I penalty of \$10,500. In Count II, Complainant alleges the same statutory violation as it alleges in Count I for fifteen different individuals, but seeks a \$1,700 penalty for each of the violations, resulting in a \$25,500 total civil penalty for Count III. See id. at 3-4. For both Count I and Count II allegations, Complainant also seeks an order directing Respondent to cease and desist from violating either or both of the above-cited portions of the INA. See id. at 3, 5.

In Count III of its Complaint, Complainant alleges that Respondent failed to prepare employment eligibility verification forms (I-9s) and/or failed to retain and/or make available for inspection such I-9 forms for forty-four named individuals in violation of section 274A(a)(1)(B) of the INA, 8 U.S.C. § 1324a(a)(1)(B). See Compl. at 5-6. Complainant seeks a \$690 penalty per violation, resulting in a total Count III penalty of \$30,360. In addition, in Count IV, Complainant alleges the same statutory violation as it alleges in Count III for ninety-eight named individuals, recommending a \$400 penalty per violation, for a total Count IV penalty of \$39,200. See id. at 7-10.

Count V includes allegations that Respondent failed to ensure that forty-nine named individuals properly completed section one of their respective I-9 forms and failed to complete section two of the same I-9 forms for those individuals, in violation of 274A(a)(1)(B), 8 U.S.C. § 1324a(a)(1)(B). See Compl. at 11-12. Complainant seeks a \$300 penalty per violation, for a total proposed penalty of \$14,700.

Complainant alleges, in Count VI, that Respondent failed to complete section two of seventy-five named individuals' respective I-9 forms, in violation of section 274A(a)(1)(B) of the INA, 8 U.S.C. § 1324a(a)(1)(B), and seeks a total penalty of \$18,750 (\$250 per violation). See id. at 12-13. Conversely, in Count VII, Complainant alleges that Respondent failed to ensure that four named individuals completed section one of their I-9 forms for a total proposed penalty of \$1,000, or \$250 per violation. See id. at 14-15.

On November 30, 1998, Respondent's counsel filed an Answer to the Complaint stating that counsel had not had contact with Respondent for approximately four years. See Ans. at 1. Accordingly, Respondent's counsel was unable to obtain sufficient information to admit or deny the allegations contained within the Complaint. After receiving this Answer, I issued a First Prehearing Order on December 14, 1998, in which I ordered the parties to file a joint proposed procedural schedule and propose dates and times for a prehearing conference.

Subsequently, on January 12, 1999, Respondent filed a Motion for Extension of Time to Submit a Joint Proposed Procedural Schedule and to Allow Ruling on Respondent Attorney's Motion to Withdraw. This motion was unopposed by the Complainant. In such motion, Respondent's counsel reiterated that he has been unable to communicate with Respondent for approximately four years, despite numerous efforts in writing and by telephone. See R's Mt. at 2. These efforts include letters sent to Respondent's Phoenix, Arizona, place of business address, as well as Respondent's California address. The Phoenix address has apparently been abandoned, and counsel asserts that some correspondence sent to the California address has apparently been received, but with no response. In addition, Respondent's counsel asserted that "[a]ll known business and personal phone numbers of the Respondent and his agents have been disconnected." R's Mt. at 2.

In the same motion, counsel asked to be allowed to follow procedures suggested by the Ethics Counsel of the State Bar of Arizona prior to filing a motion to withdraw. In accordance with these suggested procedures, I issued an order on January 19, 1999, ordering Respondent's counsel to send a registered letter to Respondent advising him that counsel intended to withdraw unless Respondent responded to counsel no later than Friday, February 12, 1999. Respondent's counsel was to advise this office whether he had heard from his client and file a motion to withdraw as counsel no later than February 15, 1999.

On February 15, 1999, Respondent's counsel filed a Motion to Withdraw as Attorney for Respondent. Counsel stated that he had complied with the above-stated procedures and received no response from Respondent. Consequently, I granted Respondent's counsel's motion in a February 22, 1999, order.

Complainant filed a Motion to Strike Answer and a Motion for Default Judgment on March 1, 1999. I then issued a March 4, 1999, order that required the parties to submit dates and times for a prehearing conference. Since Respondent's counsel indicated that he believed his client had moved to California, and since all prior orders sent by this office to Respondent's Arizona address were returned to us by the Postal Service because Respondent was no longer at that address, this order was sent to the California address for Respondent. I warned Respondent that if he failed to comply with my order, pursuant to 28 C.F.R. § 68.37(b), I might find that he abandoned his request for hearing. Thus, I could dismiss Respondent's request for hearing, grant judgment for the Complainant, and enter appropriate relief for Complainant, including imposition of a civil money penalty against Respondent, without further hearing.

Complainant filed its pleading providing proposed dates and times for a prehearing conference in accordance with my March 4, 1999, order. In this pleading, Complainant included a new address for Respondent, which indicated a location in Los Angeles, California. Given the new information as to Respondent's address, on March 23, 1999, I issued an amended order regarding dates and times for a prehearing conference, and mailed such order to Respondent at the new Los Angeles address by certified and regular mail. I extended the time in which Respondent had to submit proposed dates and times and to respond to Complainant's Motion to Strike Answer and Motion for Default Judgment until April 12, 1999.

Once again, this order contained a warning that if Respondent failed to comply with the order, I might find that he had abandoned his request for a hearing, dismiss such request, and grant judgment for Complainant, entering appropriate relief, including an imposition of a civil money penalty, without further hearing. I noted that the penalty amount Complainant is seeking is \$140,010. I received no response from Respondent in regard to this order, nor did Respondent respond to Complainant's Motion to Strike Answer and Motion for Default Judgment.

III. ANALYSIS

Complainant alleges that because Respondent's answer was nonresponsive, the Answer should be stricken as never having been filed within thirty days after service of the complaint. See C's Mt. to Strike Ans. and Mt. for Default Judgment at 8. However, Respondent, through his attorney, did file an Answer within the applicable thirty-day time period. Service of the Complaint and Notice of Hearing is completed upon receipt by the addressee, which in this case was the attorney of record, Mr. Bustamante. See Rules of Practice and Procedure for Administrative Hearings, 64 Fed. Reg. 7066 (1999) (to be codified at 28 C.F.R. § 68.3(b)). The Complaint and Notice of Hearing were properly served on Respondent's counsel. Moreover, Respondent's counsel submitted an Answer in response to the Complaint, although he had not had contact with Respondent for approximately four years. Even though the responses to the allegations in the Complaint were that Respondent had insufficient information to admit or deny the allegations, Respondent did, in fact, file an Answer.

Because Respondent's counsel was appropriately served with the Complaint and Notice of Hearing and appropriately filed an Answer within thirty days after service of the Complaint, I will not grant Complainant's motion to strike Respondent's answer or grant default judgment on that basis. Instead, I enter a default judgment for Complainant on the basis that Respondent failed to comply with my properly served March 4, 1999, and March 23, 1999, orders (proper service of an order is effected by mailing to the last known address of a party, see Rules of Practice and Procedure for Administrative Hearings, 64 Fed. Reg. 7066 (1999) (to be codified at 28 C.F.R. § 68.3(a)) and as such, has abandoned its request for hearing.

OCAHO rules of practice and procedure provide that a party shall be deemed to have abandoned a request for hearing if the party or his representative fails to respond to orders issued by the Administrative Law Judge. 28 C.F.R. § 68.37(b) and (b)(1) (1998). Further, "OCAHO case law

demonstrates that failure to respond to an order triggers a judgment of default, equivalent to dismissal of [Respondent's] request for hearing ..." United States v. Rodeo Night Club, 5 OCAHO 695, 697 (Ref. No. 812) (1995), 1995 WL 813236, at *2. In Rodeo, as here, the respondent filed an answer to the complaint, but then failed to respond to a Judge's order. The Judge concluded that respondent had abandoned its request for hearing. See id.

As stated previously, Respondent has failed to comply with my March 4, 1999, and March 23, 1999, orders and has not responded to Complainant's Motion to Strike Answer and Motion for Default Judgment. In fact, Respondent has had no contact with this office since the initiation of this proceeding. Even in instances where a respondent has filed an answer to the complaint, a default judgment may be entered against the respondent if it fails to respond and comply with the Judge's orders. See id. at 696-97; United States v. Erlina Fashions, Inc., 4 OCAHO 586, 588, 591 (Ref. No. 605) (1994), 1994 WL 526369, at *1, 3; United States v. Hosung Cleaning Corp., 4 OCAHO 776, 776-77 (Ref. No. 681) (1994), 1994 WL 645787, at *1-2.

Since I allowed Respondent's counsel, Mr. Bustamante, to withdraw from his representation of Respondent, Respondent is seemingly without counsel. However, even in cases where they appeared without counsel, parties that failed to obey an order of the judge have been found to have abandoned their requests for hearing or to have abandoned their complaints. See United States v. Columbia Sportswear Mfrs. Inc., 5 OCAHO 669, 672 (Ref. No. 808) (1995), 1995 WL 813118, at *3; Holguin v. Dona Ana Fashions, 4 OCAHO 142, 146 (Ref. No. 605) (1994), 1994 WL 269357, at *3; United States v. Erlina Fashions, Inc., 4 OCAHO 586, 589-91; Brooks v. Watts Window World, 3 OCAHO 1708, 1710-11 (Ref. No. 570) (1993), 1993 WL 566122, at *2. Accordingly, I find that Respondent has abandoned the request for hearing and is in default for failure to respond to my orders dated March 4, 1999, and March 23, 1999.

Complainant proposes the imposition of a civil money penalty amount of \$140,010 on Respondent for the allegations contained in its Complaint. Under 8 U.S.C. § 1324(e)(4)(i), a first-time violator of the knowing hire provision is subject to pay a civil money penalty of not less than \$250 and not more than \$2,000 for each unauthorized alien knowingly hired and/or continued to be employed. In addition, under 8 U.S.C. § 1324a(e)(5), a person or entity who violates the employment eligibility verification system shall receive "a civil money penalty in an amount of not less than \$100 and not more than \$1,000 for each individual with respect to whom such violation occurred." The penalties sought by Complainant are within the statutory limits. Since Respondent defaulted and failed to contest the penalty demanded, I find the total fine in the amount of \$140,010 to be reasonable.

IV. CONCLUSIONS

For the foregoing reasons, I rule that:

1. Respondent's request for hearing is abandoned;
2. Respondent is in default;
3. Each and every paragraph of the Complaint, including the seven counts and the prayer for relief, has been admitted by Respondent by its failure to comply with my March 4, 1999, and March 23, 1999, orders;
4. Respondent shall pay a civil money penalty in the amount of \$140,010;
5. Respondent is also ordered to cease and desist from hiring or continuing to employ aliens in the United States knowing the aliens are, or have become, unauthorized aliens with respect to such employment; and.
6. The hearing is canceled.

ROBERT L. BARTON, JR.
ADMINISTRATIVE LAW JUDGE

APPEAL INFORMATION

This Order shall become the final agency order unless modified, vacated, or remanded by the Chief Administrative Hearing Officer (CAHO) or by the Attorney General.

Administrative review by the CAHO is governed by 8 U.S.C. § 1324a(e)(7) and 28 C.F.R. Part 68. Pursuant to 28 C.F.R. § 68.54(a)(1), a party may file a written request for administrative review with the CAHO within ten (10) days of the date of this final order, stating the reasons for or basis upon which the party seeks review.

Attorney General review of this Order, or any CAHO order modifying or vacating this order is governed by 8 U.S.C. § 1324a(e)(7) and 28 C.F.R. Part 68. Within thirty (30) days of the entry of a final order by the CAHO, or within sixty (60) days of the entry of an Administrative Law Judge's final order if the CAHO does not modify or vacate such order, the Attorney General may direct the CAHO to refer any final order to the Attorney General for review, pursuant to 28 C.F.R. § 68.55.

A petition to review the final agency order may be filed in the United States Court of Appeals for the appropriate circuit within forty-five (45) days after the date of the final agency order pursuant to 8 U.S.C. § 1324a(e)(8) and 28 C.F.R. § 68.56.

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of April, 1999, I have served the foregoing Order Denying Complainant's Motion to Strike Respondent's Answer, Finding Abandonment by Respondent, and Entering Default Judgment for Complainant on the following persons at the addresses shown, by first class mail, unless otherwise noted:

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